Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Definition of Radio Markets for Areas Not Located In An Arbitron Survey Area	)	MB Docket No. 03-130

TO THE COMMISSION

PETITION FOR RECONSIDERATION

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TABLE OF CONTENTS

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SUMMARY

We, the Diversity and Competition Supporters, include both of the largest Hispanic organizations in America, as well as some of the largest and most respected African American, Asian American and Native American organizations. We include the organizations representing the nation's Hispanic broadcasters and the nation's minority journalists. We represent millions of Americans.1/

No one has an expectation of approval of every paper she lodges with the government. But all parties, large and small, are entitled to respect for exercising their rights under the Petition Clause of the First Amendment. Everyone is entitled to have her comments considered, fairly evaluated, and ruled upon.

Among many other things, the Commission failed even to acknowledge eleven of our fourteen proposals,2/ emasculated a twelfth,3/ irrationally postponed a thirteenth,4/ postponed the fourteenth without explanation,5/ repealed without notice its only policy designed to protect minority television ownership,6/ twice failed to act on a time-sensitive pre-Comment-date procedural motion,7/ omitted mention of the first hearing on minority ownership in 19 years;8/ failed to mention that we had sought a stay,9/ and then rushed to a vote -- actually saying "the record is complete" although scores of filings tendered during the

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1/ The views expressed in these Comments are the institutional views of the Diversity and Competition Supporters, and do not necessarily reflect the individual views of each of their respective officers, directors, advisors or members.

2/ See pp. 14-28 *infra*.

3/ See pp. 8-10 infra.

4/ See pp. 10-12 infra.

5/ See pp. 13-14 infra. This proposal was lumped together with twelve nonregulatory proposals that were not intended for, nor were they submitted to, the Commission. See p. 13 n. 92 infra.

6/ See pp. 32-36 infra.

7/ See p. 4 n. 44 infra.

8/ See pp. 4-5 infra.

9/ See Letter to Hon. Michael K. Powell from David Honig, April 21, 2003; Letter to Hon. Michael K. Powell from David Honig, April 28, 2003 ("April 28, 2003 Letter"), pp. 22-23. As the Third Circuit pointed out yesterday, "under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter." Prometheus Radio Project v. FCC, No. 03-3388, Order #E-59 (per curiam, September 3, 2003) ("Prometheus Stay Order") (granting stay).

most critical twelve last days of the proceeding had yet to be logged in.10/ To appreciate the magnitude of these acts and omissions, please imagine this:

It is September, 2006 and another UNE-P triennial review opens with an NPRM that is associated with twelve Commission research studies. In October and November, Verizon, BellSouth, SBC and Qwest (the "BOCs"") move twice for an order seeking public comment on five additional Commission research studies and seeking expanded review of certain policies relating to the protection of BOC subscribers. Each time, the Bureau says it is reviewing the motions, and it promises to rule on them. By January, 2007, comments are due, but the Bureau has not yet ruled on the motions. Nonetheless, the BOCs file fourteen proposals which, when combined with earlier filings incorporated into the docket, consume hundred of pages of text and evidentiary support. The BOCs' comments are timely filed and all of the BOCs' supplemental filings are lodged within the time allotted.

In 2003, the Commission had adopted its only policy (the "BOC Subscriber Protection Feature") designed to protect the BOCs' subscribers. Since the NPRM did not address that policy, the BOCs only briefly mention it in their comments.

In April, unsure whether the Commission would actively review their proposals, the BOCs ask for a stay. In May, a public hearing is held on the issues raised by the BOCs, and four commissioners participate in the hearing. Then, one day before the record closes, AT&T files a letter withdrawing its endorsement of one of the BOCs' key proposals. Noting that the docket does not reflect AT&T's letter and other pertinent filings (including several of the BOCs' own filings), the BOCs file a "Motion to Postpone the Vote", in which they point out that the comments and ex parte filings are running twelve days behind the capacity of the Commission's

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10/ That is not an exaggeration, and actually it is even worse. On May 31, 2003, we moved for a postponement of the vote until the 12-day delayed record actually caught up with the docket so that thousands of filings (including ex parte letters filed under 47 C.F.R. §1.1206) could be reviewed. See Emergency Motion of the Diversity and Competition Supporters et al. for a Brief Postponement of the Vote, Due Largely to the Collapse of the Commission's Public Comment System" (May 31, 2003). Obviously the record was not complete; yet the Commission denied the motion by holding that "the record is complete." The Commission also blamed us for "failure to file [our] comments or requests in a timely fashion." Report and Order, n. 1323. But we did file our Comments and Reply Comments on time, and our supplemental filings were also filed within the time expressly allotted for them -- just as were supplemental filings by virtually all major trade organizations and corporate parties as well as about 750,000 individuals. An ex parte letter we filed May 30, 2003, which was a factor in our motion, was submitted only a day after (and in response to) an unexpected filing in which the NAB changed a position it had held for four years -- but the NAB was not chided for failing to file "in a timely fashion." See discussion at pp. 9-10 and ns. 70 and 76 infra.

computer system and staff to keep up with them.

In its July Report and Order, the Commission denies the October and November, 2006 motions without explaining why they were not ruled on before January, 2007.

The Commission does not explain why it did not call for public comment on the five studies.

Not only does the Commission fail to grant a stay, it fails to mention that a stay had been sought.

It denies the Motion to Postpone the Vote, saying that "the record is complete" and blaming the BOCs for supposedly not submitting its comments and other filings on time.

It does not cite to the hearing transcript. Indeed, the Commission does not mention that the hearing ever took place.

It postpones one of the BOCs' proposals in a sentence, without explanation.

It postpones review of another proposal until it determines whether granting the proposal might offend an especially malodorous federal policy that had been discarded 35 years earlier.

It dilutes and emasculates a third proposal by applying it to a category of regulatees whose composition, as the Commission acknowledges, is actually unknown.

The Commission fails to mention the existence of the BOCs' eleven other proposals.

Finally, the Commission repeals the BOC Subscriber Protection Feature. In doing so, it fails to mention that the Feature had been adopted to protect BOC subscribers.

If we were monied interests, congressional hearings would be held and heads would roll. Still, we are ever optimistic that the Commission will take corrective steps, including reversal of each of the above-analogized actions and omissions. Furthermore --

We ask that the Commission develop voice tests for television that include only those "voices" that nearly all Americans -- and not just the 85% who can access and afford cable or satellite service -- actually receive.11/

11/ See pp. 28-29 infra.

We ask that the Commission reverse its unanticipated and unprecedented authorization of triopolies. We explain that triopolies would take off the transaction table the critical big-city television properties which would be the linchpins of any new over-the-air national network primarily serving youth and children, minorities, or people of faith.12/ We also show that by preferring local synergies to national and regional synergies, triopolies would close the door to new entrants seeking to build new national or regional television station groups.13/

We ask the Commission to undo its repeal of the sales solicitation feature of its failed/failing/unbuilt stations policy (the "Sales Solicitation Feature"), under which in-market sellers had to offer their stations to potential buyers outside their market. This was the only structural policy created specifically to protect minority and female television ownership -- a critical fact not even mentioned in the Report and Order.14/ We point out that by abandoning this policy, the Commission has crossed the line from merely permitting consolidation to affirmatively promoting consolidation. In doing so, the Commission has given in-market buyers a free hand to shut out minorities, women and new entrants, and to force sellers to create duopolies and triopolies.15/

We urge the Commission to relax and update its ancient community of license and transmitter site rules, which were well suited for the buildout of radio in its early years but which inhibit competition and diversity today. Specifically, we propose that:

1. A licensee whose station is in an Arbitron market should be able to choose any community of license in its Arbitron market, as long as its operation there would not violate the interference rules.

2. A licensee whose station is not in an Arbitron market, yet draws the majority of its listeners from an Arbitron market, should be allowed to relocate to any community in that market if, in doing so, it does not violate the interference rules.

3. A station's 60 dbu contour should be required to cover 50% of the population of the community of license.16/

12/ See pp. 30-31 infra.

13/ See pp. 32-32 infra.

14/ See pp. 32-33 infra.

15/ See pp. 34-36 infra.

16/ See pp. 36-38 infra.

The first priority for move-ins would be stations owned by SDBs; the second would be lower powered suburban facilities that could become competitive full market signals if moved in. After all of the move-in applications are processed, filing windows for drop-ins and signal upgrades would open up to allow for backfilling of the spectrum freed up by the move-ins. Consistent with the Section 307(b) priorities, these filing windows would open in this order:

1. Full power drop-ins that provide new or competitive local service whose audience will primarily be a rural community;
2. Rural LPFMs;
3. Rural translators;
4. Urban translators; and
5. Class of service, power, and tower height upgrades of full power stations

We demonstrate that move-ins would especially help minority owned companies, which are burdened with signals that do not adequately cover their markets.17/ Further, we document how more move-ins and drop-ins would increase radio's economic competitiveness, improve service to urban and rural communities, and create numerous opportunities for new entrants.18/

In Grutter v. Bollinger,19/ this June, the Supreme Court found that racial diversity in the classroom promotes competitiveness and quality in business. In like manner, racial diversity in broadcasting promotes competitiveness and quality in the programming that sustains the well informed populace that is essential to democracy. Thus, we ask the Commission to determine how it can apply the teachings of Grutter to its structural ownership regulations.20/

17/ As we point out:

> Ironically, Jim Crow residential segregation has disproportionately locked minority radio listeners into the inner cities, while the equally strange fruit of broadcast licensing discrimination has disproportionately locked minority broadcasters into the suburbs. Relaxation of the community of license and transmitter site rules would do much to repair this historical damage by enhancing the value of the holdings of minority owners. On top of this...the creation of new rural allotments from freed-up rural spectrum would provide ownership opportunities for new entrants, including minority managers ready to buy or build their first stations.

Infra, p. 44 (fn. omitted).

18/ See pp. 41-42 infra.

19/ Grutter v. Bollinger, ___ U.S. ____, 123 S.Ct. 2325 (decided June 23, 2003) ("Grutter"). See pp. 44-47 infra.

20/ See p. 47 infra.

Standing in the west hallway of the 8th floor of the Commission's offices, one can look out and see a sacred place. It is the granite block marking the spot where Dr. Martin Luther King stood, 40 years and seven days ago, in the shadow of history. No words could better capture the reason for our filing of this Petition in 2003 than the words Dr. King left in 1963 for our contemplation:

> [W]e have come here today to dramatize an appalling condition. In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.
>
> This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.
>
> So we have come to cash this check -- a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to open the doors of opportunity to all of God's children. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood.21/

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21/ Delivered on the steps at the Lincoln Memorial in Washington D.C. on August 28, 1963. Source: Martin Luther King, Jr: The Peaceful Warrior, Pocket Books, NY (1968).

The Diversity and Competition Supporters (identified in Annex 1), pursuant to 47 U.S.C. §405(a) and 47 C.F.R. §1.429, respectfully petition for reconsideration of the Report and Order, FCC 03-237 (released July 2, 2003) ("Report and Order").

I. The Commission Recognized, But Failed To Address, The Need To Preserve Ownership By Minority And Other Disadvantaged Businesses

Minorities hold just 1.3% of the asset value of American broadcasting[22] -- the most influential industry in the world. That is a national disgrace. During the last century, Congress and the courts took action to cure minority exclusion from the exercise of democracy, which was perpetuated by denial of access to the ballot.[23] Now is the time for the Commission to cure minority exclusion from the process of democracy, which is being perpetuated by denial of access to the electronic media.[24]

The Commission, Congress and the courts have long been uncomfortable with the abysmally low incidence of minority ownership.[25] Since 1975, the Commission has been obliged to tailor its structural ownership rules to foster minority ownership.[26] To its credit,

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22/ See Initial Comments of Diversity and Competition Supporters in MB Docket No. 02-277 (filed January 2, 2003) ("Initial Comments"), p. 17.

23/ Throughout the first eight generations of the Republic, people of color could not participate fully in government. During that time, trillions of dollars worth of broadcast licenses were given away for free to Whites only. See Initial Comments, pp. 19-35; Comments of MMTC in MM Docket 01-317 (filed March 19, 2002) ("Radio Ownership Comments"), pp. 71-104. To bracket this history, recall that the Supreme Court's first modest step toward enfranchisement of all Americans was taken in the same year the Radio Act was adopted. Nixon v. Herndon, 273 U.S. 536 (1927) (outlawing the White primary). The Court outlawed literacy tests for voting the year after the FCC adopted its first EEO rules; see Oregon v. Mitchell, 400 U.S. 112 (1970) and Nondiscrimination in the Employment Practices of Broadcast Licensees, 18 FCC2d 240 (1969).

24/ Minority inclusion in broadcasting enhances minority access to democracy. Without Black owned radio, David Dinkins and Harold Washington would never have been elected Mayor of New York and Mayor of Chicago respectively. See, e.g., Testimony of Tony Gray, President, Gray Communications, at Public Hearing on "The Impact of Media Consolidation on Minority Representation and Ownership," Detroit, Michigan, May 19, 2003, Tr. 46 ("Detroit Hearing Transcript"), Excerpts at Annex 3 hereto.

25/ The relevant statutes, legislative history, and court and commission caselaw are discussed at length in the Initial Comments, pp. 50-61.

26/ See Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975). In 1985, the Commission acknowledged that "our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership." Multiple Ownership of AM, FM and Television Broadcast Stations (MO&O on reconsideration), 100 FCC2d 74, 94 (1985) (prior and subsequent histories omitted) (adopting the Mickey Leland Rule, which provided that an interest of up to 49% in minority-controlled stations would not be subject to attribution with respect to two stations per service beyond the otherwise applicable national ownership caps). In the first biennial review, the Commission acknowledged that it "has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry." 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (NOI), 13 FCC Rcd 11276, 11283 ¶22 (1998).

albeit after a slow start,[27] the Commission devoted a section of the Report and Order to "Minority and Female Ownership Diversity."[28] There the Commission declared that "[e]ncouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here."[29] Yet nothing in the Report and Order will put a significant dent in the endemic problem of minority underrepresentation in media ownership.[30] Instead, read in their entirety, the rules adopted in the Report and Order will seriously undermine minority representation in media ownership.[31]

The canary in the well was the aftermath of the Commission's 1999 decision to allow local duopolies.[32] At that time, minorities owned 33 full power commercial television stations, but the duopoly rule brought to 22 the number of minority owned stations. Many of those 22 stations are unprofitable; thus, minority broadcasters are unlikely to be able to strengthen their positions through duopoly or crossownership. Triopolies present an even greater danger, since they will lock up the only big market facilities around which it would have been possible to build an independent television group owner or a new over-the-air network.[33]

The new ownership combinations permitted under the new rules will provide a boost to the competitors of minorities, who have already had a two-generation headstart in access to the radiofrequency spectrum.[34] For two generations, nonminority owned companies have not had

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27/ The notice of proposed rulemaking in the radio ownership proceeding did not even mention minority ownership. See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets (NPRM and Further NPRM), 16 FCC Rcd 19857 (2001). This was later clarified by an exchange of letters. See Radio Ownership Comments, p. 2 and n. 3.

28/ Report and Order, ¶¶46-52.

29/ Id., ¶46 (fn. omitted).

30/ The history of minority underrepresentation in media ownership is discussed in the Radio Ownership Comments, pp. 71-104, and in the Initial Comments, pp. 17-35. A primary cause of minority exclusion from media ownership was the Commission's two generations of issuing and routinely renewing broadcast licenses of rabid segregationists. See Radio Ownership Comments, pp. 71-90. In 1955, the Commission went so far as to hold that the Communications Act is not inconsistent with state segregation statutes. Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) (discussed in the Radio Ownership Comments, pp. 81-84).

31/ See Statement of Kofi Ofori, Annex 2 hereto, §1 ("Ofori Statement")

32/ See discussion at pp. 5-6 infra.

33/ See pp. 30-32 infra.

34/ See Radio Ownership Comments, pp. 93-98, discussing the "Analog Divide", under which, as a consequence of their late entry into broadcasting, minorities were relegated "disproportionately to high-band low power AMs and low-tower low power FMs." Id., p. 93.

to face minority competition. Using the new rules, nonminority owned companies will quickly lock up the most valuable available stations and integrate them into horizontal and vertical combinations. Stations are almost never sold out of these combinations.35/ Indeed, by suddenly repealing the Sales Solicitation Feature, the Commission, for the first time in its history, has crossed the line from permitting consolidation to promoting consolidation.36/

Our greatest fear is that investors could doubt whether minority broadcasting still has the potential for growth. If that happens, we can expect further limitations on the capital available to minority broadcasters, thereby further accelerating the decline in minority ownership.37/

Most critically, the new rules contain virtually no new plans to assist minorities and other disadvantaged businesses in securing or preserving access to broadcasting. Instead, the creation of new policies to address minority ownership has been -- once again38/ -- put off for another day, while the real action takes place on a field where almost no minorities are players.39/

35/ See Ofori Statement, §6 ("A company whose business plan is based on growing clusters will never include in that business plan an option of reducing the size of the cluster by spinning off one of these core stations. While it is not always optimal to have a cluster of the maximum permissible size, it is seldom desirable to reduce the size of any cluster. If the cluster is performing poorly, the cause of that poor performance will almost never be attributable to the decision to include a full service station in the cluster. Even if such a station performs poorly within a cluster, the business solution is always to reprogram the station rather than spin it off to a competitor.")

36/ See pp. 32-36 infra.

37/ See Ofori Statement, §1 ("If investor confidence in minority broadcasting lags significantly, we can expect further constraints on the already severe and well documented lack of access to capital faced by minority broadcasters" (fn. omitted)). Minorities' lack of access to capital is discussed in the Initial Comments, pp. 32-37.

38/ The outlook for new minority ownership policies appeared promising in 1995, when the Commission simultaneously released, and linked to each other, notices of proposed rulemaking addressing multiple ownership, attribution and minority ownership. See discussion and citations in Initial Comments, pp. 13-14 n. 23. Unfortunately, after Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), the minority ownership docket was disaggregated from the multiple ownership and attribution dockets, and it has sat dormant ever since. See Radio Ownership Comments, pp. 6-7 n. 11. On December 12, 2000, the Commission released six studies on minority ownership (the "Section 257 Studies"). See discussion and citations in Initial Comments, pp. 29-34. A month later, in the course of rejecting MMTC's petition for reconsideration of the Commission's decision to allow TV duopolies in many markets, the Commission declined to consider MMTC's minority ownership proposals in the TV local ownership proceeding because the Commission had not yet evaluated the Section 257 studies. Review of the Commission's Rules Governing Television Broadcasting (MO&O on reconsideration), 16 FCC Rcd 1067, 1078 ¶33 (2001) (prior and subsequent history omitted) ("Television Broadcasting - Reconsideration") ("[w]hile we are concerned about minority ownership, we believe...initiatives to enhance minority ownership should await the evaluation of various studies sponsored by the Commission"); see also id. at 1078-79 n. 69. That review never took place, however. Thus, eight years have passed with much study but no action on minority ownership.

39/ See, e.g., Report and Order, Dissenting Statement of Commissioner Michael Copps, p. 21. Having correctly found that minority ownership must be addressed in this proceeding, the Commission should not have allowed the Report and Order to take effect until it could certify that it had taken steps reasonably sufficient to preserve and promote minority ownership.

To be sure, the Commission has created the Advisory Committee on Diversity in the Digital Age ("Diversity Committee"), which we were proud to endorse.40/ However, the Diversity Committee should be a supplement to, rather than a substitute for, addressing minority ownership in the rulemaking itself.41/ Even if, by mid-2004, the Diversity Committee proposes and the Commission adopts substantial policies to promote minority ownership, that will be too late. By then, the most desirable properties will have been locked up in vertically and horizontally integrated clusters. Trade reports suggest that this dealmaking will be in full swing within months.42/

Yet even after adopting rules that will dramatically undermine the Commission's minority ownership objectives, the Commission fell back on the oldest of rationalizations for doing nothing: "we believe additional evidence is necessary, however, before we reach conclusions on these important issues."43/ It is astonishing to be told now that "additional evidence" is needed when the Commission failed even to call for comment on the extensive evidence contained in the Section 257 Studies44/ -- studies the Commission failed for three years to act upon.45/ Nor did the Commission cite the transcript (filed in this Docket) of the first hearing on minority broadcast ownership since 1984.46/ Remarkably, even though four commissioners participated in the hearing, the Report and Order did not acknowledge that it even

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40/ See Release, "MMTC Endorses FCC Diversity Advisory Committee," May 27, 2003.

41/ See pp. 13-14 infra (discussinng referral, to the Diversity Committee, of proposal for waivers of structural rules for selling stations to SDBs); id. pp. 10-12 (discussing referral, to Diversity Committee, of proposal to ban discrimination in the sale of a broadcast station).

42/ See, e.g., Tom Taylor, "Lew Dickey Forecasts another wave of consolidation in the next 12 to 18 months," Inside Radio, August 6, 2003, p. 2 (reporting prediction of the CEO of Cumulus Broadcasting). See also Ofori Statement, §1.

43/ Report and Order, n. 70.

44/ Two months before comments were due, MMTC and NABOB asked the Commission to affirm that minority ownership is a central interest in the proceeding, include the Section 257 Studies in the record and seek comment on them, and address the attribution rules in the proceeding. MMTC/NABOB Motion for Extension of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record (October 9, 2002), p. 1; see also MMTC/NABOB Motion for Further Extension of Time (December 9, 2002), p. 3. The Commission promptly stated that these issues "remain pending with the Commission and will be addressed separately." Order, DA 02-2989 (MB, November 5, 2002) at 2 n. 6; see also Order, DA 02-3575 (MB, December 23, 2002) at 3 n. 12. But the Commission did not rule on these requests until the Report and Order, and even then it did not explain its decision not to seek comment on the Section 257 studies after it sought comment on twelve other studies that did not address minority ownership. Report and Order, n. 70 and ¶629.

45/ See n. 38 supra.

46/ See Detroit Hearing Transcript, Annex 3 hereto.

took place.47/ Yet still we are told that "additional evidence" is needed, without a word that identifies what evidence is missing.

Such callous disregard for a subject this critical is antithetical to the command of Congress in the first section of the Communications Act: that the Commission was created to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]48/

Regulation and rule enforcement have deep consequences for racial diversity in the media. Thanks largely to nonenforcement of the EEO rules since 1998, minority participation in radio and television news has dropped so dramatically that the RTNDA and UNITY have scheduled a Diversity Summit to address the problem.49/ In like manner, structural deregulation directly and adversely impacts minority ownership. In the three years after local TV duopolies were permitted in 1999, minority ownership of full power commercial television stations declined

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47/ The May 19, 2003 hearing was co-convened by the Governor of Michigan, both of Michigan's Senators, the two most senior Members of Congress, and the Mayor of Detroit. Presiding was Congressman John Conyers, the ranking minority member of the House Judiciary Committee. Four commissioners participated -- Commissioner Copps in person, and Chairman Powell, Commissioner Abernathy and Commissioner Adelstein through thoughtful and substantive videotaped statements. Numerous witnesses emphasized, with great passion and depth, the need for minority ownership initiatives to be adopted now. Yet in what must be a first for FCC rulemaking orders, the Report and Order did not even mention that the Detroit hearing had taken place. Future readers of the FCC Record would never know that it happened.

48/ 47 U.S.C. §151 (1996) (underscored language added in the Telecommunications Act of 1996).

49/ The 2003 RTNDA/Ball State University Annual Survey, which tracks minority participation in broadcasting, yielded these findings [n/a is "not available"]:

Job Category	% Minority (1994)	% Minority (2001)	% Minority (2002)	% Minority (2003)
Total TV News Workforce	17.1%	24.6%	20.6%	18.1%
Total Radio News Workforce	14.7%	10.7%	8.0%	6.5%
TV News Directors	7.9%	8.0%	9.2%	6.6%
Radio News Directors	8.6%	4.4%	5.1%	5.0%
TV General Managers	n/a	8.7%	5.2%	3.6%
Radio General Managers	n/a	5.7%	3.8%	2.5%

See Bob Papper, "Women & Minorities: One Step Forward and Two Steps Back, The Communicator (RTNDA, July/August, 2003), pp. 20-25. Minorities own 4.2% of the nation's radio stations, and hundreds of radio stations and dozens of television stations are Spanish language facilities. A 2002 MMTC analysis of broadcast employment patterns found that 52% of minorities in radio work at minority owned stations. See Comments of EEO Supporters in MM Docket 98-204 (Broadcast and Cable EEO) (April 15, 2002) ("EEO Supporters Comments in Docket 98-204"), p. 53 n. 124. It follows that nonminority owned English language stations almost certainly employ almost no minorities as news directors or general managers. RTNDA attributes the dramatic decline of minority participation in radio to "the elimination of the EEO rules." Id., p. 21.

from 33 stations to 20.[50]

When the Commission adopted new EEO rules last year, Chairman Powell declared that "it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by [broadcast] licenses."[51] Yet the Report and Order threatens to undo the achievements of the EEO proceeding even before the Commission begins to enforce those rules. As witnesses at the Detroit hearing pointed out, structural ownership deregulation tends to inhibit minority broadcast employment by reducing the number of entry-level and journalism positions.[52] A decline in minority broadcast ownership is likely to reduce minority broadcast employment even further, since minority owners are the single greatest feeders of minority talent into the broadcasting industry.[53]

Conversely, given the need for on the job training to become an owner, the full inclusion of minorities in broadcast ownership is likely to be stalled by declining minority employment in broadcasting. Only major surgery in this proceeding can stop this self-feeding cycle of resegregation of broadcast ownership and broadcast employment.

In our Comments and subsequent filings, we proposed fourteen race-neutral regulatory initiatives aimed at promoting racial diversity in media ownership, and at promoting diversity in ownership generally. With only one last-minute exception,[54] no party opposed any of our

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50/ See Initial Comments, p. 18. The number of minority owned full power commercial television stations has since increased to 22. To be sure, our research shows that after local radio ownership deregulation in 1996, the number of minority owned stations increased although the number of minority owners decreased. See Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (March, 2002) ("Consolidation and Minority Ownership") in Radio Ownership Comments, Appx. 1, pp. 10-12. That appears to be the fortunate result of public-spirited corporate stewardship by two broadcast companies, Clear Channel and Infinity, which included minorities at the earliest stages of the process of station spinoffs. Id.; see also Initial Comments, pp. 46-47. The new rules are unlikely to generate many spinoffs, however.

51/ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second R&O and Third NPRM), 17 FCC Rcd 24018, 24127 (2002) (Separate Statement of Chairman Michael K. Powell).

52/ See Detroit Hearing Transcript, Testimony of Janine Jackson, Fairness and Accuracy in Media, Tr. 7-8; Verna Green, Black Chamber of Commerce, former President, WLJB, Tr. 12-13; Peter Dicola, Director of Economic Analysis, Future of Music Coalition, Tr. 18.

53/ See EEO Supporters Comments in Docket 98-204, supra, p. 53 n. 124 (reporting that 52% of minorities in radio work at minority owned stations).

54/ In 1999, the NAB stated that it did not oppose MMTC's proposal to restrict eligibility for intact sales of grandfathered clusters to socially and economically disadvantaged businesses ("SDBs"). The NAB reiterated that position in its Reply Comments. However, one day before the record closed in this proceeding, the NAB withdrew its support for this proposal. We responded the next day, although we are not sure the Commission reviewed our response before it issued the Report and Order. See p. iv n. 10 supra and pp. 9-10 and ns. 70 and 76 infra.

proposals. Several parties either supported our proposals[55/] or specifically endorsed substantial efforts to promote minority ownership.[56/] Yet the Report and Order contained no mention of the existence of eleven of our fourteen proposals:[57/]

- One proposal, relating to the sales of grandfathered clusters intact, was diluted in a way that is likely to render it virtually meaningless.[58/]
- Another proposal, seeking a ban on race and gender discrimination in broadcast transactions, was postponed for reasons that unfortunately recall a bygone era.[59/]
- One proposal was postponed for what could be many months, with no explanation of why it could not be addressed now.[60/]
- Five proposals, aimed primarily at racial diversity in ownership, were not mentioned at all.[61/]
- Six proposals, aimed generally at all forms of diversity in ownership, also were not mentioned.[62/]

Although the Report and Order appears to fit a long pattern of Commission neglect of civil rights issues in rulemaking proceedings,[63/] we are ever optimistic that the Commission will take corrective steps. If the Commission needs additional information in order to review our

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55/ One of our proposals, seeking staged implementation of any new regulations, was simultaneously and independently put forward by Paxson Communications. See Paxson Communications Comments (January 2, 2003), pp. 6-14. See pp. 24-25 and n. 143 infra. Another proposal, urging the use of JOAs (joint operating agreements ("JOAs") rather than JSAs or LMAs, was initially advanced by CWA. See pp. 22, 31-32 infra.

56/ See generally Comments of NABOB (January 3, 2003) and Comments of NOW (January 2, 2003); see also Comments of CWA (January 2, 2003), pp. 59-62; Comments of UCC (January 2, 2003), pp. 17-19 and 55-56; Comments of AFL-CIO (January 2, 2003), pp. 23-25; Comments of National Association of Hispanic Journalists (January 2, 2003), pp. 6-9; Comments of Entravision Holdings, LLC (January 2, 2003), pp. 4-10.

57/ The Commission was intimately familiar with these proposals. During the comment period, we met with each commissioner and with 17 members of the staff, for a total of 20 meetings. See MMTC ex parte letters of November 12, 2002, January 30, 2003, February 10 and 12, 2003, March 3, and 10, 2003, and May 5, 15, 20 and 30, 2003. Every meeting request we made was granted, and no meeting was perfunctory or nonsubstantive.

58/ See pp. 8-10 infra, explaining that our proposal to establish SDBs as the eligible class of buyers was rejected in favor of the far more dilute "small business" classification.

59/ See pp. 10-12 infra., discussing Commission's decision to defer consideration of a policy banning race and gender discrimination in broadcast transactions until it can determine whether a nondiscrimination requirement would impose "any direct or inadvertent effects on the value and alienability of broadcast licenses" (Report and Order, ¶52).

60/ See pp. 13-14 infra.

61/ See pp. 14-19 infra (discussing omission of any reference to proposals that would have, inter alia, incentivized the sale, incubation, sharing of time and financing of stations to be acquired by SDBs).

62/ See pp. 19-28 infra (discussing omission of any reference to our proposals for mathematical touchstones for diversity, zero tolerance for ownership rule abuse, use of JOAs as an alternative to LMAs and JSAs, opening FM spectrum for new entrants, staged implementation of deregulation, and market-based diversity credits as an alternative to voice tests).

63/ See Initial Comments, pp. 24-39, for the Commission's history of repeatedly ignoring, shortchanging and postponing action on minority ownership proposals.

proposals, the Commission is respectfully requested to so notify us and we will supply whatever is needed.64/

II. The Commission Should Reexamine Several Proposals To Promote Diversity

A. The Commission Should Reconsider Its Rejection Of Our Proposal For Cluster Spinoffs to Socially And Economically Disadvantaged Businesses

We proposed a procedure under which the seller of a grandfathered cluster would not have to break it up if it were sold to an SDB.65/ The Commission adopted a provision for transferring a grandfathered cluster intact, but then decided that small businesses, rather than SDBs, would constitute the class of eligible buyers.66/ Unfortunately, the Commission's definition of "small business" is inherently flawed, because the Commission does not know how many small businesses there are, nor what might be the demographic breakdown of small businesses.67/ It actually appears that 88% of radio broadcasters would qualify as small businesses under the FCC's definition, and only about 4.5% of these would be minority owned.68/

64/ The Commission rejected several parties' proposals by treating them as falling outside the scope of the proceeding. Report and Order, ¶¶623-632. If the Commission regards any proposal we have advanced as falling outside the scope of the proceeding, we respectfully request that such proposal either be placed in the appropriate active docket, or that it be treated as a petition for rulemaking, be assigned an "RM" number, and be placed on public notice as provided by 47 C.F.R. §1.403.

65/ See Initial Comments, pp. 107-109.

66/ Report and Order, ¶¶488-490.

67/ Report and Order, Appx. I, Initial Regulatory Flexibility Analysis, ¶7, estimating that about 10,427 of the 10,945 commercial radio stations meet the SBA's small business definition of $6 million or less in annual receipts, but adding:

> We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations are included. Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules (fns. omitted).

Of course most (not just "many") radio stations are part of "much larger corporations with much higher revenue." In a largely consolidated industry, the SBA's small business definition is meaningless. See also Ofori Statement, §2.

68/ Id. Unfortunately, it seems as though the SDB definition in Senator McCain's Telecommunications Ownership Diversity Act of 2003, S.267 (introduced January 30, 2003, and aimed at restoring much of the tax certificate policy) is also unlikely to provide relief to a class in which minorities are significantly represented. See Ofori Statement, §2.

The cluster initiative has been questioned by Commissioner Adelstein on the basis that it will be rarely used.69/ On the other hand, the NAB maintains that even this modest initiative is too much.70/ For our part, we could support this initiative if it were designed correctly. It is unacceptable, in a nation 26% minority, for the Commission to hold out, as its sole initiative to promote minority ownership,71/ a plan whose eligible class is only 4.5% minority.

Certainly "small business" is not the right paradigm, since it includes all businesses of a certain size, most of which have never experienced any difficulty in securing access to capital. For example, a company owned by the child of a billionaire could qualify as a small business, but that company would not qualify as an SDB.

The record did not show a need for aid to small businesses generally. Instead, it showed a need for assistance to minority businesses specifically.72/ Thus, the Commission should develop its own definition of SDBs that will focus on those businesses, particularly minorities,

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69/ See Dissenting Statement of Commissioner Jonathan Adelstein, p. 23. To be sure, the infrequency of application of a civil rights initiative is no reason not to undertake the initiative, as long as the initiative is not held out as the sole remedy. At times, a program's infrequency of application is invoked as a reason to eliminate the program. See, e.g., Brewer v. West Irondequoit Central School District, 212 F.3d 738, 743 (2d Cir. 2000) (Parker, J., concurring) (doubting that a small inter-school district transfer plan could survive judicial scrutiny, since during 35 years that the plan was in effect, the Rochester, NY school district minority population increased from 25.6% to 80% while the percentage of White students in participating suburban districts stood at between 85% and 92%. Judge Parker concluded that "it is extremely difficult to see how this program has had any meaningful impact" on school integration). The perception that it is not worth saving a modest program also helps explain the Commission's 1985 repeal of the worthy but seldom-used Clear Channel eligibility criteria (favoring minority applicants for certain new AM facilities). Deletion of AM Acceptance Criteria in Section 73.37(e) of the Commission's Rules (R&O), 102 FCC2d 548, 558 (1985), recon. denied, 4 FCC Rcd 5218 (1989) ("Clear Channel Repeal") (holding that a "sounder approach" than eligibility criteria is to use distress sales and tax certificates to promote minority ownership. Only thirteen minority owned stations had been created during the two years when the policy was in effect. Id. at 555.) Ironically, civil rights initiatives are also abandoned because they appear to be too successful, as happened when the tax certificate policy was repealed in 1995. See Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995).

70/ One day before the record closed, the NAB filed a letter objecting to our proposal because "smaller owners who may not be able to locate minority or female purchasers that are able to pay full value for station clusters should not be forced to suffer financially to achieve these worthy goals." Letter to Hon. Michael K. Powell from Jack N. Goodman, Esq., May 29, 2003; compare NAB Reply Comments (February 2, 2003), p. 44 n. 79 (although it "would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser (see NAB's Comments at 83-84) NAB does not oppose MMTC's proposal.") The NAB's May 29, 2003 objection was not well taken. See Ofori Statement, §3 (explaining that minorities actually pay more than others for stations because "[f]irst, the financial market discriminates against minorities by forcing them to sign personal guarantees, post excessive collateral, and accept higher rates of interest. Second, sellers very often require minorities to offer more money because of the false perception that minorities are unlikely to close or due to the buyer's relative inexperience and lack of a long history of successful closings. Third, simply to get their feet in the door and have brokers return their phone calls or seek them out, minorities must develop a reputation for paying generously for properties" (fn. omitted)).

71/ See Report and Order, ¶51 (stating that this initiative will result in "greater participation in communications markets by small businesses, including those owned by minorities and women[.]") The initiative is discussed in a section entitled "Minority and Female Ownership Diversity," which in all other respects actually is devoted to postponing or rejecting proposed minority and female ownership initiatives. Id., ¶¶46-52.

72/ See Initial Comments, pp. 29-34 (discussing numerous research studies produced by NTIA and the Commission itself).

that tend to experience difficulty securing access to capital.[73]

Finally, we urge the Commission to adopt a corollary to its cluster sales policy that would increase the frequency with which the procedure is used: the Commission should exempt from attribution, under its equity-debt plus ("EDP") policy,[74] seller financing which would permit an SDB to acquire a grandfathered radio cluster intact.[75] SDBs often have difficulty accessing capital; thus, seller financing is often an essential tool in enabling SDBs to grow.[76]

B. The Commission Should Declare Now That Race And Gender Discrimination In Broadcast Transactions Violates The Law

In our Comments, we proposed a rule against discrimination in broadcast transactions.[77] Our proposal would require only that the seller check a box on a Form 314 or Form 315.[78] The effect would be that a seller could not indulge invidious race or gender stereotypes or outright prejudice in deciding which qualified buyers to solicit and consider.[79]

The proposal did not require even a slight reorganization of the way broadcast properties are sold. We did not propose an affirmative recruitment plan analogous to Section 73.2080(b) and (c) of the broadcast EEO rule; instead, we proposed only a nondiscrimination rule analogous to Section 73.2080(a) of the broadcast EEO rule. Further, the customary protections of

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73/ Letter to Chairman Powell from David Honig, May 27, 2003, p. 2 n. 1 ("the Commission could follow any of several interim approaches to rendering SDB eligibility determinations. For example, the Commission could draw upon the record compiled in the six Section 257 studies completed in 2000; or it could review transactions case by case based on transferee's individualized showings of social and economic disadvantage; or it could consult with the Treasury Department in adopting an interim eligibility policy. The task of tying down the precise definition of a qualifying SDB is not so daunting that it should prevent the Commission from adopting the SDB Transfer Option as part of the forthcoming Report and Order.")

74/ See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests (R&O), 14 FCC Rcd 12559, 12573-91 ¶¶26-65 (1999) (subsequent history omitted) (adopting EDP rule).

75/ A related proposal is advocated at pp. 17-19 infra (discussing grandfathering of nonattribution of EDP interests in SDBs). The Commission should reserve the right to require assurances, by certification or otherwise, that the loan documentation was consistent with industry norms and that the seller is fully insulated operationally from the buyer.

76/ We do not agree with the NAB that SDBs would have difficulty paying fair market value for grandfathered clusters, or buying anything else they are given a chance to buy. See n. 70 supra. Nonetheless, we do recognize that the availability of seller financing would make such acquisitions easier for SDBs to carry out. Thus, facilitating seller financing would be responsive to the NAB's objection.

77/ Initial Comments, pp. 115-120 and (in more detail) April 28, 2003 Letter, pp. 11-19.

78/ Initial Comments, pp. 120; see also id., pp. 119-120 n. 199 (contending that certification is sufficient, given the sophistication of media brokers and counsel).

79/ See April 28, 2003 Letter, p. 18 (citing, as examples of pretextual and stereotypical excuses not to solicit or consider qualified minority potential purchasers, the belief that "minorities are only qualified for, or only interested in, urban or Spanish stations" and that "minority and woman-owned companies might not observe transactional confidentiality and that they are unqualified to close a transaction.")

confidentiality, present in all broadcast transactions, would still be observed in all instances. Finally, legitimate nonracial, non-gender selection criteria could still be used to choose where to solicit potential buyers and where to draw the line between serious prospects and tire kickers.80/

It is a tribute to the goodwill of the broadcasting industry that our proposal was unopposed.81/ We understand this to be the first occasion when no opposition surfaced after a federal authority was asked to adopt a nondiscrimination rule or statute. Unfortunately, that wasn't good enough:

> While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.82/

We do not believe the Commission meant this paragraph to read the way it literally reads. Self-evidently, nondiscrimination does not adversely impact the "value and alienability" of broadcast licenses: rather, it is discrimination that has these consequences. Discrimination artificially reduces the size of the pool of potential buyers, thereby depressing demand and reducing property values.

The real estate industry's experience in the wake of the 1968 Fair Housing Act showed that, notwithstanding the predictions of segregationists, nondiscrimination in the sale of housing does not reduce property values.83/ And while White homeowners sometimes do refuse to sell

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80/ See April 28, 2003 Letter, p. 17. Examples of acceptable criteria could include, inter alia, company size (i.e., for stock deals), geography, format specialization (as an affirmative factor for including a company in a solicitation list, but not as a stereotype to exclude a company from a solicitation list), financial qualifications, and ability to close the transaction.

81/ See also p. 44 and n. 215 (discussing broadcast industry's participation in Grutter).

82/ Report and Order, ¶52 (emphasis supplied).

83/ Douglas S. Massey & Nancy Denton, American Apartheid, Segregation and the Making of the Underclass (1993), p. 95 (noting that while many Whites believe that property values fall once African Americans integrate a neighborhood, "evidence suggests the opposite, at least during the transition process.")

to minorities,[84] there is no evidence that Whites would not alienate their homes if they had to consider minority purchasers.

The Commission's policies against restraints on alienation would actually militate in favor of a nondiscrimination policy. The Commission frowns on arrangements under which regulatees impose on themselves irrational limitations on the scope of the eligible class of purchasers of their facilities.[85] A nondiscrimination rule would preclude the most irrational of such regulatee-imposed limitations.

A nondiscrimination rule will offer much needed protection to minority entrepreneurs at the very time -- the onset of deregulation -- when they need it most. Such a rule would offer considerable comfort to investors and capital providers, who would thereafter be more secure that minorities and women, on the basis of race or gender, will no longer be kept unaware of potential deals.[86] Capital flows to opportunity, and the starting point for opportunity is nondiscrimination.

Above all, this is a moral issue -- a question of right and wrong. There is no reason to take up the Diversity Committee's time with this most straightforward of matters.

The Commission erred by not doing more; indeed, the Communications Act requires the Commission to do more.[87] It can correct this error now by declaring, unequivocally, that race and gender discrimination in the sale of a broadcast station is against the law and will be prosecuted assiduously.

84/ See Alex M. Johnson, Jr., "Shaping American Communities: Segregation, Housing and the Urban Poor: How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods," 143 U. Pa. L. Rev. 1595, 1620-21 (May, 1995) (explaining that even when Whites move out of a neighborhood, they still wish to maintain friendships with their to-be-former neighbors (whose children may be their children's friends) and thus avoid the loss of friendship that the neighbors "can impose on the allegedly 'traitorous' white neighbor who sells her home to a Black.") Fortunately, broadcasters seldom have this motive for discrimination. Broadcasters almost surely are less concerned about what their former competitors think than homeowners are concerned about what their former neighbors think.

85/ See, e.g., Applications of Advanced Mobile Phone Service, Inc., 53 RR2d 1127 (1983) (voiding partnership agreement's restriction against alienation to non-wireline carriers).

86/ See p. 3 supra; see *Ofori Statement*, §1.

87/ See 47 U.S.C. §151 (1996) (creating the Commission to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]" (new language added in the Telecommunications Act of 1996 underscored)). Although the 1996 amendment to Section 151 is not self-executing, the Commission has not yet initiated a proceeding to implement the amendment.

C. The Commission Should Adopt Incentive Plans Aimed At Promoting Racial Diversity In Media Ownership

In our comments, we proposed six race-neutral rule waivers and incentive initiatives. One was mentioned only in passing and referred to the Diversity Committee, and the other five were neither mentioned nor ruled upon. Two proposals, first advanced by MMTC in 1999 and tabled by the Commission in 2001 for further study, were among those not mentioned in the Report and Order.[88/] Another proposal, the subject of an NPRM issued eleven years ago during the Sikes administration and still pending, was also not mentioned.[89/]

For a generation, the Commission has promoted diversity with market-based incentives. The tax certificate program, the Top 50 policy, the distress sale policy, and the Mickey Leland Rule are examples that we have sought to build upon with our proposals.[90/] Our incentive proposals, and their fate in the Report and Order are described briefly below.

1. Structural Rule Waivers for Selling Stations to SDBs

In our Initial Comments, we stated:

> With the possible exception of lack of access to capital, the unavailability of quality stations to buy is the single greatest barrier to the growth of minority owned broadcast companies. Therefore, the single most important incentive the Commission could create is one that would allow a company to conclude an otherwise-premature transaction if it sells stations to socially and economically disadvantaged businesses.[91/]

The Commission referred this proposal to the Diversity Committee,[92/] an action that probably renders the proposal largely moot.[93/] Most of the major transactions to which this proposed initiative could be applied are likely to occur in the forthcoming year. It is improbable

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88/ These include structural rule waivers for financing construction of an SDB's unbuilt station, and grandfathering of nonattribution of EDP interests in SDBs. See discussion at pp. 16-19 infra.

89/ See p. 15 infra.

90/ These policies, and more generally the use of incentives in FCC diversity jurisprudence, are discussed in the Initial Comments, pp. 15-16 and n. 25.

91/ Initial Comments, p. 103.

92/ This was one of thirteen proposals referred to the Diversity Committee. The other twelve were never directed to the Commission, since they were nonregulatory in nature. See "Twelve Minority Ownership Solutions," in MMTC, "Background Materials: Omnibus Media Ownership Proceeding Stakeholders Meeting, U.S. Department of Commerce, November 6, 2002 (cited in the Report and Order, ¶49 and n. 76).

93/ See Letter to Hon. Michael K. Powell from David Honig, May 15, 2003 ("[w]hile we realize that the Commission might not rule on each of our proposals at this juncture, we feel strongly that it ought to do so....the consequences of this proceeding could render some of our proposals moot. Further, we believe the APA obliges the Commission to consider our proposals at the same time as it considers other parties' proposals.")

that the Commission can act on the Diversity Committee's recommendations before the most incentive-worthy transactions have already closed. This proposal is ripe for approval immediately so it can be used in the forthcoming wave of transactions.

2. Tolling Buildout Deadlines For Selling Expiring Construction Permits To SDBs

In 1998, Entravision Holdings LLC ("Entravision") submitted a petition for rulemaking (RM-9567; still pending) which sought to revise the construction permit expiration standard established pursuant to §§319(a)-(b) of the Communications Act and implemented in 47 C.F.R. §73.3598. Entravision proposed that the Commission allow holders of expiring construction permits to sell them to entities in which minorities own at least 20% of the equity, or to entities which commit to serve the programming needs of minority or foreign language groups for at least 80% of their operating time. We suggested a modification of Entravision's concept to make it applicable to all SDBs.[94/] Further, we urged that Entravision's plan, as modified, "would be a far superior market mechanism for disposing of expiring permits than the current plan for automatic expiration. The proposal allows the Commission to quickly and efficiently place an expiring permit in the hands of those who the Commission has found are likely to promote diversity right now."[95/] The plan would rescue the investments of permittees who had tried in good faith to build out their facilities, it would enhance the likelihood that the public will receive service on an expedited basis, and it would relieve the Commission of the time and expense of putting the allotment out for bids again.[96/] By advancing diversity, lifting regulatory impediments facing broadcasters, reducing the Commission's workload, and promoting the rapid delivery of service to the public from a qualified applicant, the proposal is conceptually similar to the distress sale policy, which the Commission has operated successfully for 25 years.[97/]

This unopposed proposal has been pending for five years. In light of the Commission's huge application processing backlog, this proposal is especially timely and ripe for approval.

94/ Initial Comments, pp. 112-115.

95/ Id., p. 113.

96/ Id., pp. 113-114.

97/ See Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 983 (1978) ("1978 Policy Statement").

3. Structural Rule Waivers For Creating Incubator Programs

We urged the Commission to act on still-pending incubator plans developed in 1992 by Chairman Sikes and by NABOB. With constitutionally required modifications, these plans would allow a company to acquire more than the otherwise-allowable number of stations in a market if the company establishes a program that substantially promotes ownership by disadvantaged businesses.98/ The incubator programs could encompass management or technical assistance, loan guarantees, direct financial assistance through loans or equity investment, training and business planning assistance.99/

Since this proposal carried the tentative endorsement of a former commission, it is not inconsequential. Eleven years after being put out for comment, and with no opposition, it deserves approval.

4. Bifurcation Of Channels For Share-times With SDBs

In a copiously detailed proposal in the radio ownership proceeding, MMTC proposed the creation of a new class of "Free Speech Stations."100/ These stations would have at least 20 non-nighttime hours per week of airtime.101/ They would be independently owned by small disadvantaged businesses,102/ and they would be primarily devoted to nonentertainment programming.103/ A Free Speech Station would share time on the same channel with a largely deregulated "Entertainment Station."104/ A cluster owner that bifurcates a channel to accommodate a Free Speech Station and an Entertainment Station could buy another fulltime station in the market by taking advantage of Section 202(b)(2) of the Telecommunications Act,

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98/ Initial Comments, pp. 103-105. See Revision of Radio Rules and Policies (MO&O and Further NPRM), 7 FCC Rcd 6387, 6391 ¶21 (1992) ("1992 Radio Rules - Reconsideration") (concluding that "encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance"); see id., 7 FCC Rcd at 6391-92 ¶¶22, 24-25 for a discussion of the incubator proposal itself.

99/ 1992 Radio Rules - Reconsideration, 7 FCC Rcd at 6392 ¶¶24-25.

100/ Radio Ownership Comments, pp. 111-173. See also Initial Comments, pp. 106-107.

101/ Radio Ownership Comments, p. 118.

102/ Id., pp. 119.

103/ Id.

104/ Id., p. 118.

which allows for an exception to the local radio ownership rule when a new station is created.105/ That additional fulltime station would also be bifurcated into a Free Speech and an Entertainment Station. In this way, a cluster could grow steadily up to the limits allowed by antitrust law. Further, as a result of this plan, the number of sources and viewpoints available to the public would grow exponentially, and minority and SDB ownership would get a much-needed boost.

Seven years ago, the Commission promised to conduct a proceeding to implement Section 202(b)(2) of the Telecommunications Act.106/ The Free Speech Radio proposal offers the Commission its opportunity to honor its promise.

5. Structural Rule Waivers For Financing Construction Of An SDB's Unbuilt Station

In the 1999 television duopoly proceeding, MMTC proposed that:

> when a broadcaster provides an SDB with an equity/debt plus interest ("EDP Interest") that enables the SDB to build out an unbuilt permit, (1) the EDP Interest should be deemed nonattributable, and (2) the entity providing the EDP Interest (the "EDP Provider") should be reserved a place in line to subsequently duopolize or crossown another same-market station.
>
> SDBs are often highly motivated to build out unbuilt television or radio permits and thereby add a new independent voice to the community. Larger, same-market competitors often lack this motivation because they typically prefer to duopolize or crossown stations that are already on the air.
>
> SDBs wishing to build out (or acquire, then build out) an unbuilt permit could often benefit substantially from EDP Interests provided by a large broadcaster, especially one that understands the market. However, large broadcasters might hesitate to provide such an EDP Interest. It would be an attribution time bomb, set to explode once the unbuilt permit is built out. Furthermore, the EDP Interest, if attributable, could preclude the large broadcaster from acquiring another television station (or one or more radio stations) in the same market.
>
> To resolve this dilemma, we propose that an EDP Interest be deemed nonattributable if it was provided to an SDB to build out, or acquire and build out, an unbuilt permit.

105/ Id., pp. 158-161. Section 202(b)(2) of the 1996 Telecommunications Act authorizes the Commission to allow an entity to own, operate or control more radio stations in a market than the number specified in 47 C.F.R. §73.3555(a)(2) "if the Commission determines that such ownership, operation, control or interest will result in an increase in the number of radio broadcast stations in operation." Channel bifurcation does indeed give rise to an increase in the number of stations, since each station in a share-time is a "radio station" under 47 C.F.R. §73.1715 (authorizing commercial share-time operations).

106/ Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership (Order), 11 FCC Rcd 12368, 12370 n. 2 (1996) (promising that "[t]he implementation of [Section 202(b)(2)] will be addressed in a Subsequent Notice of Proposed Rulemaking.")